IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION.

CHAMBER SUMMONS No.1585 of 2003
IN
EXECUTION APPLICATION No.285 of 2003
IN
SUMMARY SUIT No.2140 of 2000.

M/s. Kapashi Commercial Ltd **..Plaintiff.**

V/s.

M/s. Gazi Capital Services Ltd**..Defendant.**

And

Mrs. Shirin Munir Gazi. ..Applicant.

WITH

CHAMBER SUMMONS No. 1598 of 2003

IN

EXECUTION APPLICATION No. 285 of 2003

IN

SUMMARY SUIT No. 2140 of 2000.

M/s. Kapashi Commercial Ltd. ..Plaintiffs.

V/s.
M/s.Gazi Capital Services Ltd. ..Defendants

And

G-Tech Info Training Ltd. ..Applicant.

Mr. N. Lapasia i/b. Niranjan & Co. for
plaintiff.

Mr. D.H. Mehta i/b. N.N. Bhadrashete for
applicant in Chamber Summons No. 1585 of 2003.

Mr. N. Raja for Applicant in Chamber Summons
No. 1598 of 2003.

Ms. Sahim Degani i/b. Bagla Dandekar & Co.
for defendants in both the Chamber Summons.

CORAM:S.C.DHARMADHIKARI,J.

DATED: 24TH JULY, 2006.

P.C.:-

1] Chamber Summons No. 1585 of 2003 is taken out by the applicant and she prays for raising of attachment on immovable property which is more particularly described at Exh.A to the affidavit in support of the Chamber Summons. It is clarified that the attachment is sought to be raised only with regard to the premises at Mehta House bearing Nos.11 and 12/A, I Floor, 36 Pandita Ramabai Marg, Mumbai,400 007.

2] The case of the applicant who is, admittedly, the wife of one of the Directors of the Defendant Company, is that Judgment Debtor/defendant has no right, title and interest in the premises. No tenancy rights

have been conferred upon the Defendant in respect of these premises. All that is permitted is that the Public Limited Company [defendant] would utilize these premises as address facility for correspondence. In other words, for enabling the defendant to have a correspondence office, the applicant permitted the defendant company to print and publish the address of these premises on its letter heads, envelopes, etc.

3] Additionally, it is contended that both premises have been acquired by the applicant utilizing her own funds. She has given details of the transaction which she had entered into with regard to both premises in her affidavit in support, so also in the deposition recorded by the Court Commissioner. She has submitted that these documents coupled with the share certificates issued by the Co-operative Society would demonstrate that the Company had no right, title and interest in these premises. They are her absolute properties. In these circumstances, the attachment of these premises in Execution of the Decree passed against the Defendant

Company is wholly illegal and invalid.

4] The original plaintiff has filed an affidavit in reply and it is contended that the entire story in the affidavit is false. Based upon this denial and the assertions in the further affidavits that this Court directed that evidence be recorded in these Chamber Summonses. A Commissioner was accordingly appointed for recording evidence and both sides appeared before the Commissioner.

5] It needs to be further set out that this Court attached movables in execution of the decree, as well. The applicant claims right, title and interest in the movables. Her case is that the movables namely Television set, computer,etc. have been purchased by her from her own funds and there are Bills and Invoices which would demonstrate this fact.

6] The facts which are not in dispute are that a Summary Suit was filed by the plaintiff/ decree holder against the defendant and a decree was passed therein by consent, on

28th September, 2000. The decretal dues as per the warrant of attachment is Rs.28,04,098/- which is inclusive of costs and interest upto 17th September, 2000. A Warrant of Attachment was issued on 19th August, 2003 and movable and immovable properties have been attached in pursuance thereof.

7] Mr. Mehta appearing for the applicant submits that in the affidavit in lieu of examination-in-chief the applicant has deposed in detail and established her right,title and interest in these premises. In para 1 and 2 details of acquisition of the premises bearing No.12/A have been set out. Further, she has made a categorical statement that she has utilized her own funds for purchasing the premises. Similarly, in para 4 of the affidavit in lieu of examination-in-chief filed on 19th April,2005 the details of acquisition of premises no.11 in the same building, have been set out. The details pertaining to the share certificates with regard to premises No.11 are set out in para 11 and identical statement with regard to the funds has been made in para 6. The applicant,

in addition, relies upon a certificate issued by the Co-operative Society,as also the equitable mortgage created in favour of Development Credit Bank Ltd. and H.D.F.C. Bank.

8] Mr.Mehta relies upon paras 13 and 14 of the affidavit which read, thus;

> 13. " I say that I file my Income Tax Return. I have disclosed the said two premises in my tax returns. I say that original Income Tax return challan in terms of Form No.2-D is filed with concerned Tax Authority. I have a counter copy of the said challans. Alongwith the said return I have filed Schedules to Accounts (31/3/2002) and set out in Schedule "C" and Schedule "D" regarding Fixed Assets and Investments. I have submitted said Challan and Schedule C & D at Exh.K."
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> 14. "I say that in the said two premises, I have not created any kind of right, title or interest of any nature whatsoever including the tenancy to and in favour of the defendant Company herein. I say that the Defendant Company has never claimed and/or had no occasion to claim any right, title or

interest in the said premises at any point of time and for any reason whatsoever. I say that the defendant was never in the possession of the said two premises nor the defendant has carried any business in the said premises for any period whatsoever. In fact, my husband has used the said premises for running his coaching classes known as Gazi Commerce Classes. I say that I had permitted my husband to give address of my premises for the purpose of correspondence of the defendant Company. I say that whenever a letter used to be address even it may be in the name of defendant Company and if the letters are addressed at the address of the said premises they used to be accepted because myself and my husband are the Directors of the said Company. I have not received any amount from the Defendant company towards rent, licence fee, etc. for any reason whatsoever."

9] Mr. Mehta submits that in this affidavit the applicant has deposed also with regard to the movables and has produced the Bills and Invoices which would demonstrate that payment has been made for the Air Conditioner, Television Set and the furniture by the applicant. Mr. Mehta has invited my attention to Section 60 of the Code of Civil Procedure and submits that this is not a

property belonging to the Judgment Debtor or over the profits of which he has a disposing power. In these circumstances, he submits that the attachment be raised and the Chamber Summons be made absolute.

10] Mr. Mehta submits that the applicant was cross-examined at length by the original plaintiff, but during the course of cross-examination her testimony has not been proved to be false or that the same is not shown to be untrustworthy. On the other hand, during the course of the cross-examination, neither any question is putforth with regard to the documents of title produced nor the funds which have been utilized for the transaction pertaining to the premises. It is apparent that all questions during the course of cross-examination are pertaining to the Company and/or other concerns in which the applicant and her husband are Directors. Such questions and queries pertaining to the affairs of the Company would not in any manner demonstrate that the applicant has not proved her right, title and interest in these premises.

11] On the other hand, Mr.Lapasia appearing for the plaintiff/decree holder, submits that this is a case where the wife has come forward to claim an independent right, title and interest in the premises which belong to a Company. It is pertinent to note, according

to him, that both applicant and her husband, Munir Gazi are Directors of this Company. It is not disputed that the Company operates from these premises. It is unconceivable that the wife has any independent source of income to acquire the premises. He has invited my attention to the cross-examination wherein wife admits that apart from doing some cookery courses she has no source of income. She has admitted that she is Director of the Company (Judgment Debtor) alongwith her husband. She may be income tax payer but the Form which has been relied upon has not been produced in full details. Ultimately, the Department of Income Tax was required to be approached and it has produced certain relevant and material documents. In these circumstances and when the Company was carrying on business in the premises,then it cannot be said that it has no right, title and interest therein. Therefore, the attachment of the movables and immovable properties is justified and the Chamber Summons should be dismissed.

12] With the assistance of Mr.Lapasia and Mr. Mehta, I have perused the affidavit in support of this Chamber Summons, Reply and Rejoinder. I have perused the depositions recorded during the course of examination-in-chief and cross-examination of the applicant. The applicant has alone stepped into witness box. None other has been examined by either the applicant or the decree holder. It appears from the record that an

affidavit was filed by the husband of the applicant. But before the Commissioner it is recorded that he does not want to lead any oral or documentary evidence for and on behalf of defendants.

13] There are certain documents which are summoned from the Income Tax Department, as also from the records of this Court and the Commissioner has recorded that these witnesses are only for production of documents and have not,in any manner, deposed during the proceedings.

14] Order XXI, Rule 58 of the Code of Civil Procedure provides for adjudication of claims to or objections to attachment of property. The entire procedure is set out in Sub Rule 1 of Order XXI Rule 58. In Sub Rule 2 it is clarified that all questions including questions related to right, title and interest to the property attached arising between the parties to the proceedings or their representatives under this Rule, and relevant to the adjudication of the claims or objections, shall be determined by the Court dealing with the claims or objections and not by a separate suit. The adjudication into the questions leads to an order which operates as a decree. Thus, Order XXI Rule 58 enacts a complete code for adjudication of claims or objections to attachment of property.

15] The applicant Mrs. Shirin Munir Gazi

has, as pointed out by Mr. Mehta, deposed at length and produced documents of title which demonstrate that she is the owner of these premises. She has produced share certificates and has relied upon the records maintained by the Co-operative Society. This part of her testimony, is not at all shattered in the cross-examination. Rather the cross-examination proceeds on the basis that these documents including the agreement are genuine and valid. In this behalf, a reference can usefully be made to the cross-examination which has been recorded on 19th August, 2005. During the course of questioning, the applicant has replied that she has never resided in the premises. She has given details in answer to questions with regard to the situation and location of the premises and whether they are adjacent to each other or not. In the entire cross-examination, I did not find anything by which it could be said that the applicant's testimony with regard to the documents produced by her, has been falsified nor that they were proved to be not genuine. The questioning is with regard to her role in the defendant company. The questioning proceeds on the basis that the applicant and her husband are Directors of the Company, against whom consent decree has been passed. There are several concerns including Commercial Classes which are functioning in these premises. Questioning is on the basis that applicant and her husband play a major and

substantial role in Companies and concerns operating from the premises.

16] In all fairness, an attempt was made to find out as to whether the Company had any Bank account and whether the Company had carried on any business. The Company operated from the premises by holding meetings including Annual General Meeting and Board meeting. However, when the applicant disclosed that the Company has a bank account with Development Credit Bank, the cross-examination has not been pursued further on this aspect. No attempt is made to link the purchase or acquisition of premises in question with the funds of the Company. Despite questioning, the applicant with regard to her source of funds, neither any details are sought with regard to her bank accounts, nor statements from the concerned bankers and books of account summoned or produced. If the attempt was to pierce the veil of the company and show that the company has acquired these premises and the name of the applicant has been put as purchaser then the decree holder should have proceeded along those lines. The cross-examination has been lengthy but on this material and relevant aspects there appears to be no questioning. Further, there is no attempt made by the decree holder to summon any document or books of account pertaining to the company and the applicant. It is clear that the Documents evidencing purchase of these premises by Applicant have been produced

and their contents proved. The Co-operative Housing Society's records have also been accepted. The Transactions are concluded much prior to the subject money decree.

17] It is in these circumstances that I am unable to agree with Mr.Lapasia that these premises belong to the company and therefore the attachment is valid. The documents contain recitals and in one of the documents it is categorically stated that the vendor has represented to the applicant, the transferee, that he has let out the premises bearing No.11, ad measuring 497 sq.ft. built up area to Mr. Gazi Commercial Classes, a proprietary concern of Mr. Munir Abdul Latif Gazi under the tenancy agreement, dated 9th July,1993. However, a perusal of both documents/deeds as also the share certificates would demonstrate that the defendant Company has not been conferred any right to use and occupy the premises either by the predecessor-in-title of the applicant or the applicant. Infact, the specific assertion of the applicant in her examination-in-chief which is recorded on affidavit that she has not allowed the Company to use and occupy the premises, nor any right,title and interest created in its favour, has not been demolished or falsified.Mr.Lapasia submits that the details (Form No.2D) produced by the Income Tax Department would show that Rent / Compensation is received by the Applicant from these

premises. She has disclosed this as her source of income. Therefore, the Deposition on affidavit is false. It is not possible to accept this contention. The applicant is not questioned about this income. There is no document summoned from the defendant Company. Nothing prevented the Decree Holder from summoning the relevant records of the Company when the Transfer/Sale Deeds are not disputed, then, by this stray entry in the Tax Records, the Decree Holder cannot achieve anything.

18] In the above circumstances, it is not possible to hold that the defendants have any right, title and interest in the premises. The property cannot be said to be attachable in the Execution of a money decree passed in favour of the decree holder/plaintiff.

19] As far as the movables are concerned, the applicant asserted her right,title and interest in the same but in para 113 of her deposition at page 71, this is what is stated:-

> 113. " It is not true that this document does not show that I have made payment of the amount appearing in this document. It is true that this document does not show mode of payment i.e. by cash or by cheque. I am not aware whether on 12-09-1996 whether I was in

India or out of India. I cannot say that on 12-09-1996, I was out of India. It is not true that document at Exh.N is forged and fabricated document."

20] In these circumstances, by producing the copy of some Invoices from Alfa Vision allegedly an Authorized Dealer operating from Thane, the applicant could not have proved that the Samsung Colour T.V. belongs to her. There is an Invoice of 11th September, 2001 pertaining to some furniture items. However, this Bill is silent about when the quantity allegedly supplied thereunder was delivered. There is no delivery challan. There is no receipt of any payment. Similar is the position with regard to an Invoice pertaining to National Air Conditioner. In the light of this fact and further in the absence of any documentary evidence to show that the payment was made by the applicant for purchasing these items, I am of the view that it would not be safe to raise the attachment with regard to movables on the bare testimony of the applicant.

21] Lastly, Mr. Lapasia submits that the Returns and Forms filed with the Income Tax Department were not fully disclosed and a Officer had to be summoned to get the records. He invites my attention to the answer given at para 116 by the applicant and contends that had entire documents alongwith the details

which are referred to in this para been produced, it would reveal that the judgment debtor company had right, title and interest in these premises. I am unable to accept this submission. Once I find that an attempt was not made beyond questioning about the General Meetings and Passport of the applicant then on the basis of the Income Tax files and Returns the Decree Holder could not have proved that the Defendant Company had right, title or interest in the subject premises. More so, when the Transfer Deeds are proved. The Company ought to have been called upon to produce all details with regard to its Bank Account. In the event of the Company not co-operating, concerned banker could have been approached. In these circumstances, by merely relying upon a stray admission or a statement during the course of cross-examination, it cannot be said that as far as the immovable property is concerned, the applicant's version has been falsified in any manner.

22] One of the property had been acquired way back in the year 1989. As far as the other premises are concerned, they have been acquired under the Deed of Transfer, dated 12th August, 1998. The share certificates are issued some time in the year 1990 and 1999. In these circumstances, it would not be possible to hold that the applicant has not proved her right, title and interest in the premises. Accordingly the following order:-

O R D E R.

1] Chamber Summons No. 1585 of 2003 is allowed to the extent that the immovable property being Premises situate at 11 and 12-A, Mehta House, 1st Floor, 36,Pandita Ramabai Road, Chowpatty, Mumbai 400 007 shall stand released from attachment. However, the attachment will continue with regard to the Jolly Maker Premises and movables referred to in the Warrant of Attachment, dated 19th August,2003.

2] As far as Chamber Summons No. 1598 of 2003 that is taken out by the applicant which is a Company and it seeks to raise the attachment of Computers. However, the applicant has not stepped into witness box nor evidence has been led on their behalf of their authorized Officer. In this situation, by relying upon the documents which are annexed to the affidavit in support, it would not be proper to hold that the Computers have been purchased and belong to the applicant. It is not a co-incidence that date of purchase bears proximity to the date of decree passed in the Summary Suit. These statements from the affidavit in support of Mrs. Shirin Gazi in CHS No.1598 of 2003 are denied by Anand Shrinivas Kulkarni, Commercial Manager of the Decree Holder. Under these circumstances, it was incumbent upon the applicant to have led evidence. No evidence is led. This Chamber

Summons will have to be dismissed and accordingly it stands dismissed.

3] No order as to costs.

4] Mr. Lapasia at this stage, clarifies as far as the premises of Jolly Makers Chambers are concerned, the attachment could not be levied in pursuance of the order of attachment. This fact is not disputed by Shri.Bhadrashette appearing for the applicant.

5] None has appeared for the defendant during the course of recording of evidence, save and except, the husband who was not cross-examined by the decree holder. There are no details forthcoming with regard to the Jolly Maker Premises. However, it would be open for the decree holder to attach these premises in pursuance of the Warrant of Attachment, at a subsequent stage.

[S.C. DHARMADHIKARI,J]